

No. 15,927 ✓

IN THE
United States Court of Appeals
For the Ninth Circuit

JIMMIE LEE FLORES,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

On Appeal from the United States District Court for the
District of Hawaii in Criminal No. 11,111.

APPELLEE'S ANSWERING BRIEF.

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JURISDICTIONAL STATEMENT.

Appellee agrees with the jurisdictional statement
contained in Appellant's Opening Brief.

STATEMENT OF FACTS.

Since the Appellant contends that the verdict was
contrary to the weight of the evidence, the following
facts are pertinent:

Castro testified he gave Appellant his address where
he would receive mail in Puerto Rico (TR 29) and

then from Puerto Rico sent a letter to Appellant giving his new address (TR 30-32), but Castro never heard from Appellant, never received the \$3,000 or an offer to pay such amount (TR 34). Appellant, having been entrusted with the endorsed checks (TR 28), deposited them in an account in his and his wife's name (TR 111) and later commingled the funds with his own (TR 123, 137-8). Still later he used these funds for his own purposes (TR 139-141).

STATUTES INVOLVED.

Section 11360, Revised Laws of Hawaii 1945, now Section 289-1, Revised Laws of Hawaii 1955.

Chapter 263. GROSS CHEAT.

Section 11360. Defined. Whoever shall designedly, by any false pretense and with intent to defraud, obtain from another any money, goods, or other thing of value, is guilty of a gross cheat; for example, the obtaining of money or other property from another under false pretense of being sent for the same by a friend or acquaintance of his; or obtaining money by means of a letter fabricated in the name of another. [P.C. 1869, c. 21, s. 1.]

Section 11440, Revised Laws of Hawaii 1945, now Section 293-21, Revised Laws of Hawaii 1955.

Section 11440. False pretenses; punishable as larceny. Every person who knowingly and designedly, by any false or fraudulent representation, statement or pretense obtains from any other

person, money, labor, services or property, whether real or personal, or who knowingly and designedly by any false or fraudulent representation, statement or pretense, together with a promise or undertaking of future performance, obtains from any other person money, labor, services or property, whether real or personal, or who knowingly and designedly causes or procures another to report falsely of his wealth, mercantile character or credit standing, and thus obtains credit or obtains the labor or services of another, is punishable in the same manner and to the same extent as for larceny of the money or property or of property of the value of the labor or services so obtained. [L. 1949, c. 78, s. 1.]

Section 11366, Revised Laws of Hawaii 1945, now Section 289-7, Revised Laws of Hawaii 1955.

Section 11366. Gross cheat where facts show larceny. If upon the trial of any person indicted for obtaining property by false pretenses, it shall be proved that he obtained the property in question in any such manner as to amount in law to larceny, he shall not by reason thereof be entitled to be acquitted, and no person tried for such misdemeanor shall be liable to be afterwards prosecuted for larceny upon the same facts. [L. 1876, c. 40, s. 55.]

Section 532, Penal Code of California 1949.

Section 532. [Obtaining money, property or labor by false pretenses: Procuring false credit report: Punishment.] Every person who knowingly and designedly, by any false or fraudulent representation or pretense, defrauds any other person of money, labor, or property, whether real

or personal, or who causes or procures others to report falsely of his wealth or mercantile character, and by thus imposing upon any person obtains credit, and thereby fraudulently gets possession of money or property, or obtains the labor or service of another, is punishable in the same manner and to the same extent as for larceny of the money or property so obtained. [Enacted 1872; Am. Stats. 1889, p. 14; Stats. 1901, p. 466 (unconstitutional); Stats. 1905, p. 685.]

Section 484, Penal Code of California 1949.

Section 484. [Theft defined: Stealing or misappropriation of property: Obtaining money, labor, property or credit by fraud or false report: Determination of value of property or services: Representation or pretense deemed continuing: Charging date of offense: Hiring employee without advising of unpaid labor claim or judgment.] Every person who shall feloniously steal, take, carry, lead, or drive away the personal property of another, or who shall fraudulently appropriate property which has been entrusted to him, or who shall knowingly and designedly, by any false or fraudulent representation or pretense, defraud any other person of money, labor or real or personal property, or who causes or procures others to report falsely of his wealth or mercantile character and by thus imposing upon any person, obtains credit and thereby fraudulently gets or obtains possession of money, or property or obtains the labor or service of another, is guilty of theft. In determining the value of the property obtained, for the purposes of this section, the reasonable and fair market value shall be the test, and in determining the value of services

received the contract price shall be the test. If there be no contract price, the reasonable and going wage for the service rendered shall govern. For the purposes of this section, any false and fraudulent representation or pretense made shall be treated as continuing, so as to cover any money, property or service received as a result thereof, and the complaint, information or indictment may charge that the crime was committed on any date during the particular period in question. The hiring of any additional employee or employees without advising each of them of every labor claim due and unpaid and every judgment that the employer has been unable to meet shall be prima facie evidence of intent to defraud. [Enacted 1872; Am. Stats. 1927, p. 1046; Stats. 1935, p. 2194.]

(According to California authorities Section 532 was repealed by implication by amendment of Section 484; *People v. Carter*, 131 C.A. 177, 182, 21 P.2d 129; *People v. Jackson*, 24 C.A. 2d 182, 74 P.2d 1085.)

Idaho Code, 18-101 to 20-627, Crimes—Criminal Procedure—Prisons.

18-3101. Obtaining money, property or labor under false pretenses. Every person who knowingly and designedly by any false or fraudulent representation or pretense, defrauds any other person of money, labor or property, whether real or personal, or obtains the signature of another to any instrument in writing whereby any liability is created, or who causes or procures others to report falsely of his wealth or mercantile character, and by thus imposing upon any person obtains credit and thereby fraudulently gets posses-

sion of money or property, or obtains the labor or service of another, is punishable in the same manner and to the same extent as for larceny of the money or the value of the property so obtained; and the reasonable value of any labor or services and the amount of the liability created by any written instrument shall be taken as the value of such labor or services or of such written instrument. (Cr. & P. 1865, §§ 136, 137; R.S. & R.C., § 7096; am. 1909, p. 20 H.B. 112; reen. C.L. § 7096; C.S., § 8474; I.C.A., § 17-3902).

QUESTIONS PRESENTED.

Appellee has no argument with Appellant's authorities or the principles of law contained therein, but only with Appellant's conception of the Hawaii statutes in question.

Four questions present themselves in discussing the Appellant's first contention:

1. Did Sec. 11,440, Revised Laws of Hawaii, 1945, (now Sec. 293-21, Revised Laws of Hawaii, 1955) create a new crime which was not intended by the Legislature to have engrafted upon it interpretations of different laws from other states?
2. Was California law adopted and used by the Territorial Legislature in drafting this statute?
3. Does Sec. 11,366 do away with the distinction made in the California cases?

4. Regardless of the answers to the above questions, did not Castro deliver possession and title to the checks to Appellant?

ARGUMENT.

I. THE EVIDENCE BROUGHT OUT AT TRIAL PROVED THE OFFENSE WITH WHICH APPELLANT WAS CHARGED.

1. A careful comparison of Sections 11,360 and 11,440, Revised Laws of Hawaii, 1945, shows that the two sections cover entirely different things. Sec. 11,360 covers the traditional crimes of obtaining money or property under false pretenses and, as such, the effect of the statute was limited by the Supreme Court of the Territory in *Taok v. Territory*, 33 Hawaii 560 (1935). In this case the Supreme Court of Hawaii noted that Sec. 11,360 is modeled after the English statute, 30 GEO. II c.24, § 1, which is the model for many state false pretense statutes (called, in Hawaii, "gross cheat"). The Supreme Court held that, therefore this section should be read in conjunction with the limitations and interpretations placed on false pretense statutes by both English and state courts. At page 564 the Court stated that in a crime under the false pretense statutes, the false pretense or representation would have to be concerning an existing fact or a past event.

With this background, the legislative history of Sec. 11,440, Revised Laws of Hawaii, 1945 (now Sec. 293-21, Revised Laws of Hawaii, 1955), is invited to the Court's attention (see Appendix).. It becomes

quite obvious that the Committee on Judiciary of the Territory of Hawaii House of Representatives was at first concerned with amending Sec. 11,360. However, this plan was dropped. As stated in the report of the Committee, "In the redraft which Mr. Cades submitted, together with an accompanying memorandum, it was suggested that, instead of amending Sec. 11,360 of Chapter 263 relative to Gross Cheat, Chapter 267 relative to Larceny be amended to take care of offenses relative to swindling and fleecing." It is obvious in the reading of the Report of the Committee on Judiciary that the Committee was well aware that it was making new statutory crimes to take care of the situation which then existed and that it was not dealing with such frozen concepts as larceny by trick and obtaining money by false pretense. Consequently, it is contended by the Appellee that the Legislature itself intended to and did set up a new statutory crime which went further than and took into consideration the limitations of the crime of false pretenses or "gross cheat" as denominated by Hawaiian statute and, further, that this new crime was put under the larceny chapter rather than under the "gross cheat chapter" as a further indication that the Legislature considered this new crime to be closer to and akin to larceny rather than to gross cheat or false pretenses. For a situation where similar principles were applied, see *Morrisette v. U. S.*, 342 U.S. 246 at 263-273.

Though *Taok v. Territory, supra*, makes it clear that Sec. 11,360 is the "false pretense statute" in the Territory, there is no denying that the language in Sec. 11,440 is quite similar in parts to Sec. 11,360. How-

ever, it is quite clear from the legislative history of Sec. 11,440 that the Legislature was attempting, and we think it has succeeded in defining a new and different statutory crime which is broader and covers more than Sec. 11,360, the false pretense statute; and it is clear from an examination of the statute and indictment that the words of the indictment cover the situation shown by the evidence. Consequently, Appellee contends that Sec. 11,440, Revised Laws of Hawaii, 1945, encompasses a new statutory crime which includes, but is not limited to, such common-law concepts as larceny by trick and false pretenses.

2. Appellant states in his Brief that California law was used as a model for this section (Br. 12). There is no authority for this statement. Legislative history does not reveal this, nor is the section itself "practically verbatim", as alleged by the Appellant. A statute which is closer, for example, is to be found in the Idaho Code, Vol. IV, Sec. 18-3101. Appellee contends that there is nothing in the record or in the legislative history of the Hawaii statute which in any way intimates that it was borrowed practically verbatim, or otherwise, from California statutes. The construction placed upon its statutes by the Courts of California have, therefore, no relevance here.

3. However, let us assume that everything Appellant says is correct, i.e.

- a. That Sec. 11,440 is a false pretense statute.
- b. That Appellant was charged with false pretenses and that instead of false pretenses being proved, larceny by trick, scheme and device was proved, and

c. That the California statutes and the interpretation engrafted thereupon would be relevant and applicable here, if "in harmony with justice and public policy and with other laws of the adopting jurisdiction on the subject." (Quotation from Appellant's Brief, page 11.)

Even this avails Appellant naught for in Hawaii Sec. 11,366 Revised Laws of Hawaii, 1945 (presently Sec. 289-7, Revised Laws of Hawaii, 1955) would be for application. Originally enacted in 1876, prior to any California legislation on the subject, the section provides:

"If upon the trial of any person indicted for obtaining property by false pretenses it is proved he obtained the property in question in any such manner as to amount in law to larceny, he shall not by reason thereof be entitled to be acquitted, . . ."

So, even assuming the above facts, it is obvious that there is a very definite difference between California's and Hawaii's method of treating a variance of proof between false pretenses and larceny—in Hawaii there is no real variance and the accused is convicted regardless.

4. When Castro endorsed and delivered the checks to Appellant he parted with title as well as possession. He was told and believed that the checks would be put through some Army process which would take a year and a day. The jury could draw the very reasonable inference that Castro had no expectation of getting the checks themselves back at the end of this period,

but rather, that he expected to get back \$3,000. Thus, even under the California interpretations cited by Appellant, we have here a classical concept of "false pretenses".

II. THE EVIDENCE WAS AMPLE TO SUPPORT THE VERDICT OF THE JURY.

Appellant's real complaint is in essence that the jury believed Castro and not him. The jury could believe and was justified in believing Castro and disbelieving Appellant. The latter's own testimony of his acts subsequent to the acquisition of the checks was such that the jury could believe that he obtained the checks from Castro by false and fraudulent representations, statements and pretenses, and that his story about the circumstances surrounding the acquisition was false.

Appellant admits that the testimony of Castro on direct examination was sufficient to substantiate the verdict of the jury (Br. 17). There was much more but that is all that was necessary. His argument is one to be addressed to a jury—not to an Appellate Court after verdict.

Appellee believes the above principles are so self-evident as to require no citations of authority.

CONCLUSION.

The conviction in the Court below should be sustained.

Dated, Honolulu, T. H.,

May 12, 1958.

LOUIS B. BLISSARD,

United States Attorney,

District of Hawaii,

CHARLES B. DWIGHT III,

Assistant United States Attorney,

District of Hawaii,

Attorneys for Appellee.

(Appendix Follows.)

Appendix.

Appendix

JOURNAL OF THE HOUSE OF REPRESENTATIVES OF THE 25TH
LEGISLATURE, TERRITORY OF HAWAII, REGULAR SESSION
PAGES 735-736.

Mr. Marcallino, for the Committee on Judiciary, presented a report (Stand. Com. Rep. No. 189), recommending that House Bill No. 54, entitled: "An Act to amend Section 11360 of the Revised Laws of Hawaii 1945, relating to the crime of gross cheat," be placed on file, and introducing a bill in place thereof (H.B. No. 916), entitled: "An Act to amend Chapter 267 of the Revised Laws of Hawaii 1945, relating to larceny, by adding a new section to be numbered Section 11440, providing that the obtaining of money, property, labor or services by false pretenses shall be punishable in the same manner as larceny."

The report of the committee was read by the Clerk, as follows:

"Honolulu, T.H.
March 25, 1949

Honorable Hiram L. Fong, Speaker
House of Representatives
Honolulu, T.H.

Sir:

Your Committee on Judiciary, to which was referred House Bill No. 54, introduced by Representatives C. E. Kauhane, Earl A. Nielsen, Akoni Pule, Clarence K. Seong, James K. Trask, and Steere Noda, entitled: 'An Act to amend section 11360 of the Revised Laws of Hawaii, 1945, relating to the crime of gross cheat,' has had the same

under careful consideration and begs leave to report as follows:

The intended purpose of this Bill was to redefine the offenses of gross cheat to adequately take care of the typical swindling and fleecing cases so prevalent in the Territory today.

In considering this Bill your Committee heard the views of Attorney M. Watanabe, Deputy Attorney General; John R. Desha, Assistant Public Prosecutor of the City and County of Honolulu; Attorney J. Russell Cades, Chairman of the Legislative Committee of the Bar Association of Hawaii; and Attorney Jerome Hughes, Chairman of the Committee on Crimes and Criminal Procedure of the Bar Association.

As a result of the expressions of views to the effect that House Bill No. 54 as drafted did not adequately remedy the situation presented in the case of *Territory v. Taok*, 33 Hawaii 560 (1935), your Committee requested Attorney J. R. Cades to submit a redraft of the Bill. In the redraft which Mr. Cades submitted, together with an accompanying memorandum, it was suggested that, instead of amending Section 11360 of Chapter 263 relative to Gross Cheat, Chapter 267 relative to Larceny be amended to take care of offenses relative to swindling and fleecing.

Your Committee is in accord with the views of Attorney Cades that the present gross cheat statute should be left as is, inasmuch as the repeal thereof would affect existing indictments and would require a great number of changes in the statutes in which the crime of gross cheat is referred to, and that such a repeal can best be

accomplished when there is a major overhaul of the Criminal Code.

Your Committee feels that the bill in the redrafted form as proposed by Attorney Cades will meet the needs and the purposes for which the original bill was intended, and that the redrafted bill will permit indictments where a false representation of an existing fact or present event is coupled with an undertaking or promise of future performance, and believes that this redrafted bill will be effective in taking care of the typical swindling and fleecing cases.

This redrafted bill meets with the approval of the Legislative Committee of the Bar Association of the Territory of Hawaii and with the Drafting Committee of Lawyers for the Business Committee for Progressive Legislation.

Your Committee recommends that House Bill No. 54 be placed on file and introduces as its bill the redrafted bill, which is attached hereto, with the recommendation that it do pass. However, your Committee would like to give credit to the original introducers of House Bill No. 54 inasmuch as the bill to be introduced by your Committee is an outgrowth of the discussions relative to House Bill No. 54.

Respectfully submitted,

A. Q. Marcallino,

Chairman

Robert L. Hind, Jr.,

Vice-Chairman

E. P. Lydgate

Jack P. King.

Steere G. Noda

Earl A. Nielsen.”

On motion by Mr. Marcallino, seconded by Mr. Kauhane and unanimously carried, Standing Committee Report No. 189 was adopted, House Bill No. 54 was placed on file, and House Bill No. 916 passed First Reading by title and was referred to the Committee on Revision and Printing.

SENATE JOURNAL, 25TH LEGISLATURE OF THE TERRITORY
OF HAWAII, REGULAR SESSION 1949, PAGE 986.

Senator Hill, for the Committee on Judiciary, presented a report (Stand. Com. Rep. No. 276), recommending the passage of House Bill No. 916, which was read by the Clerk as follows:

“Honolulu, T.H., April 18, 1949

Honorable Wilfred C. Tsukiyama
President of the Senate.

Sir:

Your committee on Judiciary, to which was referred House Bill No. 916, entitled: ‘An Act to Amend Chapter 267 of the Revised Laws of Hawaii, 1945, Relating to Larceny, by Adding a New Section to be Numbered Section 11440, Providing That the Obtaining of Money, Property, Labor or Services by False Pretenses Shall Be Punishable in the Same Manner as Larceny’, begs leave to report as follows:

The purpose of this bill is briefly stated in the title. It is primarily intended to reach the confidence games under which so many local people have lost their life savings in the recent past.

Your Committee is in favor of the bill and recommends that it do pass.

Respectfully submitted,
Wm. H. Hill, Chairman
Ben Dillingham
M. R. Aguiar, Jr.
Neal S. Blaisdell
Wm. H. Heen''

Upon motion by Senator Blaisdell, seconded by Senator Duarte, the report of the Committee was adopted. House Bill No. 916 passed Second Reading and was placed on the calendar for Third Reading tomorrow.

